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IN THE

Supreme Court of the United States

October Term, 1955

Nos. 584 and 585

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a California corporation, FRANK GENTLES, DON F. GATES, RANDOLPH CALDWELL, FRANCIS V. NIXON, SAMUEL K. RINDGE, and WILLIAM H. JACK, *Petitioners*,

v.

F. BRITTON McCONNELL, as Insurance Commissioner of the State of California, F. BRITTON McCONNELL, Insurance Commissioner of the State of California, as Liquidator of The Pacific Mutual Life Insurance Company of California, and PACIFIC MUTUAL LIFE INSURANCE COMPANY, a California corporation, *Respondents*.

CONSOLIDATED PETITION FOR REHEARING

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CONSOLIDATED PETITION FOR REHEARING

This is a consolidated petition for rehearing filed on behalf of all of the appellants-petitioners in Nos. 584 and 585, who had filed separate Jurisdictional Statements from a decision of the Supreme Court of the State of California.

Petitioners pray that this Court grant rehearing of its order of March 12, 1956, in these cases.

Orders were granted by Justice Douglas on March 29, 1956, in No. 584, and on April 2, 1956, in No. 585,

extending the time in which to file petitions for rehearing to and including April 26, 1956.

PRELIMINARY STATEMENT

Because these cases were originally presented to this Court as an appeal from the Supreme Court of the State of California, certain aspects of the decisions below so occupied the forefront of the presentation that the importance of certain other aspects of the decisions may have been obscured or overshadowed. Moreover, since respondents-appellees filed motions to dismiss, much space in the papers was devoted to questions relating to this Court's appellate jurisdiction. This petition for rehearing is devoted principally to questions which, we believe, make these cases particularly appropriate for the exercise of this Court's certiorari jurisdiction, and which may not have been adequately presented because the emphasis in the Jurisdictional Statements and subsequent papers was directed towards supporting an appeal.

STATEMENT

This case is the culmination of approximately two decades of litigation arising from the seizure in July, 1936, of the Pacific Mutual Life Insurance Company of California by the California Insurance Commissioner. Detailed statements of the facts have been set out in the Jurisdictional Statements heretofore filed, and to avoid repetition, we include here only a capsuled summary.

In 1936, when the Old Company was declared technically insolvent because its reserves were considered to be inadequate, the California Insurance Commissioner was appointed Conservator (in 1937, he was also ap-

pointed Liquidator) and authorized to carry out a rehabilitation and reinsurance program, all under the aegis of the California courts. The rehabilitation plan called for the organization of a New Company to take over the assets and business of the Old Company. (App. F)[1] The New Company also assumed all of the liabilities of the Old Company except those growing out of the non-cancellable accident and health policies (non-cans), which were assumed upon a scaled-down basis. In exchange, the New Company's capital stock was to go to the Liquidator in trust for all interested persons, including the stockholders of the Old Company. (J. S. 585, pp. 6-8)

Among the many provisions of the rehabilitation plan, was one authorizing voluntary mutualization of the New Company. (App. F 24-31) This provision established a procedure by which, after July, 1946, the New Company could be mutualized. The machinery could be set in motion by requests from ten percent (10%) of the participating policyholders of the New Company; thereafter an Appointing Committee would be constituted which would in turn designate a Price Determination Committee composed of persons skilled in insurance company valuation. The Price Determination Committee would then determine whether mutualization could be practicably accomplished and if so, the proper price to be paid for the stock of the New Company and the terms of payment. The rehabilitation plan also provided that any mutualization plan promulgated pursuant to the procedures it established

[1] All references to Appendix are to the Appendix in No. 584. References to Jurisdictional Statements are indicated by "J. S." followed by the case number. All other references will be specifically described.

was to be submitted "in accordance with the laws of the State of California in effect at the time". (App. F 24)

The procedure established in the rehabilitation plan was put into effect, and the Price Determination Committee was appointed in January, 1947. In April, 1950, this Committee reported that mutualization was practicable and submitted a plan of mutualization. (App. G 1-3) It is this plan of mutualization, and the limitations imposed by the State of California upon any review of this mutualization plan which is the subject of the present dispute.

After the plan was reported, it was submitted to the Insurance Commissioner for his approval pursuant to the laws of California "in effect at the time" which required that he determine whether it would be "fair and equitable in its operation"[2] A hearing was held before the Commissioner at which oral and documentary evidence was taken, and thereafter, the Commissioner issued an opinion and decision approving the plan and holding that it would be fair and equitable in its operation. (App. D)

In November, 1950, the Old Company and some of its stockholders filed a petition for a writ of mandate in the Superior Court naming as respondents the New Company and the Commissioner, both in his capacity as Commissioner and as Liquidator of the Old Com-

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[2] This was done pursuant to the provisions of the California Insurance Code relating to voluntary mutualization. (App. E 11-12) As appears in the Jurisdictional Statements (J. S. 584, pp. 36-39; J. S. 585, pp. 8-10, 52-53) petitioners contend that the involuntary mutualization provisions (App. E 1-9) should have been followed.

pany. The purpose of the suit was to procure a review of the mutualization plan and to have it set aside as confiscatory. (App. C 19, 22, 27) While the Court made elaborate findings, these findings were, as stated by the Judge himself, in effect nothing but conclusions of law. (App. C 13, 14) He limited his inquiry to whether the Price Determination Committee had "acted arbitrarily" and having concluded that it had not, affirmed the Commissioner's decision because the Commissioner could not say that the Committee "acted without reason, and * * * the Commissioner * * * [could not] substitute his * * * reasoning for that of the Committee." (App. C 34) On appeal, the District Court of Appeal affirmed, restating the view that neither the Insurance Commissioner nor the Superior Court was compelled to render any independent judgment as to the fairness of the mutualization plan, but that the determination of the Price Determination Committee was sufficient of itself to support the mutualization plan. (App. B 22-25)

The Supreme Court of California, by a vote of four to three, and with three separate opinions, affirmed the judgment, but on grounds different than those stated by the District Court of Appeals. (App. A)

The Old Company and the stockholders who had challenged the mutualization plan in the California courts filed appeals in this Court. On March 14, 1956, this Court granted motions to dismiss the appeals and, treating the papers whereon the appeals were taken as petitions for certiorari, denied certiorari.

At the outset, and before reaching the Questions Presented, comment seems appropriate concerning the type of state action involved in this case. In the papers heretofore filed, contentions and counter-con-

tentions were made as to whether the action of the Insurance Commissioner in approving the mutualization plan was legislative, quasi-legislative or executive in character. (J. S. 584, pp. 22, 41; J. S. 585, pp. 6, 14, 32-37, 37-41, 42-46, 50, 52; Br. in Opp. 584, pp. 19-24) This issue was relevant, however, only with respect to whether this Court had jurisdiction over the appeals under 28 U.S.C. § 1257(2). It is entirely mooted where the case is presented by certiorari, under 28 U.S.C. § 1257(3). All that is necessary is that the action complained of be state action—of whatever nature—and that rights claimed under the Federal Constitution have been denied. Or, as this Court stated in *Shelley* v. *Kraemer*, 334 U.S. 1, at 14:

> "the [Fourteenth] Amendment makes void 'State action of every kind', which is inconsistent with the guaranties therein contained, and extends to manifestations of 'State authority in the shape of laws, customs, or judicial or executive proceedings' ".

It is clear that, from the very inception of this case when the Old Company was declared technically insolvent, to the final steps when the state courts sustained the Commissioner's approval of the plan of mutualization, the action involved has been state action, in one form or another, and as such is, of course, subject to the limitations of the Fourteenth Amendment.

REASONS FOR GRANTING THE REHEARING

1. The Question of Confiscation

The mutualization plan formulated by the Price Determination Committee and approved by the State Insurance Commissioner and the courts below is remark-

able because it establishes a form of conditional taking and conditional payment which, to our knowledge, has never before been attempted, let alone approved, by any court, state or federal.

A. The mutualization plan provides for a price of $3,000,000 plus simple interest from December 31, 1948, to the date of payment. The time for effecting mutualization is extended to December 31, 1983, and it is provided that mutualization cannot occur unless three conditions are first met.[3] The mutualization plan leaves unanswered two critical questions: will mutualization ever occur; and if so, when will it occur? All that is certain is that *if* mutualization is to take place it must be prior to 1984. And during the waiting period, the stock of the New Company is turned over to Voting Trustees who may not necessarily operate New Company in the best interests of the Old Company or the Old Company stockholders. (App. G 16)

In short, stripped of all the complicated trimmings, the first and most obvious result of the mutualization plan is that the property of the Old Company and its stockholders has been subjected to a 35 year option,

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[3] The three conditions are: (1) the non-can benefits must be fully restored; (2) the New Company's capital and surplus, and a Special Fund created out of the New Company's Participating Department, must at least equal the purchase price with interest; and (3) the surplus (after paying for the stock) must still be at least the sum of (a) four percent (4%) of the New Company's admitted assets, plus (b) twenty-five percent (25%) of premiums collected during the previous year on all group insurance written one a one year term basis, and (c) twenty-five percent (25%) of premiums collected during the previous year on all accident and health insurance.

The significance of these conditions, translated into specific terms in dollars, is discussed in detail in J. S. 584, pp. 23-25, 27-29.

for which no compensation whatsoever has been or will be paid.

The Old Company and its stockholders have been deprived of the ordinary right of a property owner to determine when he will sell and for how much—a right that is "property" within the protection of Amendment XIV. See *Old Dearborn Co.* v. *Seagram Corp.*, 299 U.S. 183, 192; *Buchanan* v. *Warley*, 245 U.S. 60, 74. They have been deprived of the right to raise money to pay off the non-cans and redeem their equity, or to get back their property when the non-cans shall have been paid off. (App. F 29-30) Control of the stock of the New Company will be turned over to Voting Trustees operating under a trust agreement established by the mutualization plan; and thus petitioners will be deprived of the benefits of the trust (with the Conservator as trustee) which the statute created for the protection of all interests, including theirs.[4] (App. C 22-23, 25)

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[4] The stockholders have also been deprived of one of the most important safeguards provided for them in the Rehabilitation Agreement—that the New Company must follow a policy of writing at least fifty percent (50%) of its life insurance as non-participating insurance. (App. F 30, 31) The stockholders derive no benefit from the participating insurance, since the Rehabilitation Agreement set up the Participating Department as if it were a separate mutual company. Therefore, the New Company could completely defeat the interests of stockholders, postpone the date of purchase of the stock and keep the purchase price down by writing more participating and less non-participating insurance. The provisions of the Plan of Mutualization affecting this point are so outrageously watered down that the stockholders are practically without protection against such a course by the New Company. (App. G 12-13)

Whether such a deprivation of the use of property constitutes a "taking" subject to the due process limitations of the Fourteenth Amendment is a substantial question of federal law not heretofore decided by this Court. It is important, not only because it is a constitutional question, but also because it can arise in both state and federal courts in myriad instances. It is a question which is obviously of importance in the field of eminent domain. For example, turnpike planners could subject property adjoining the turnpike to an option to purchase during a 35 year period, exercisable only in the event that traffic conditions required enlarging the capacity of the road. And if the decisions below approving the mutualization plan stand, the turnpike authority would not be compelled to pay any compensation for this 35 year option although it is an encumbrance on the land as real as any easement. And the same problem arises where, as here, a public body seeks to give to one private group rights in or to property which belongs to another private group. *Cf. Thompson* v. *Consolidated Gas Co.*, 300 U.S. 55, 78-80 and cases cited. See also Frankfurter, J., dissenting, in *International Harvester Corp.* v. *Goodrich*, — U.S. —, — (April 9, 1956), 24 Law Week 4183.

If an option to take, imposed by a public body, constitutes in itself a taking, it is obvious that this Court would strike it down unless provision was made for fair compensation. Yet, at the risk of repetition, but to avoid confusion, it should be noted that the $3,000,000 purchase price established by the Mutualization Plan was not as payment for this option to take, but was rather the payment to be made in the event the option is exercised. (App. G 2) *There is no payment whatsoever provided for the 35 year option.*

We believe that the question raised with regard to the validity of this 35 year option without payment imposed by the mutualization plan alone justifies plenary consideration in these cases.

B. In the event that sometime before 1984, the conditions precedent to mutualization are met and mutualization does occur, the mutualization plan provides for the payment to Old Company and its stockholders of the sum of $3,000,000 plus interest from December 31, 1948, to the date paid.[5] (App. G 5, 6) In the establishment of this figure as the purchase price of the New Company (which is the sole property of the Old Company and its stockholders by virtue of their equitable ownership of the New Company stock),[6] there arise a number of questions relating to valuation which are so fundamental and novel as to require some expression and direction from this Court.

The purchase price of $3,000,000 provided for in the mutualization plan was arrived at by the Price Determination Committee in approximately the following manner:

(a) By computing the pattern of earnings of the New Company through the year 2000. (Ex. 28, p. 8, and J. S. 584, Chart II)

(b) By estimating how much of these earnings would be available for restoration of the non-cans. (Ex. 28, p. 8)

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[5] There is also a provision for augmentation in the amount of $250,000 per year for each year by which the full restoration of the non-cans precedes December 31, 1973. (App. G 6).

[6] The first $560,000 of the purchase price may be payable to creditors in liquidation of unpaid interest claims. See Transcription of Hearing Before the Insurance Commissioner, page 885.

(c) By determining, after matching the conclusions in (a) and (b) above, that the non-cans would be fully restored some time between 1971 and 1974. (Ex. 28, p. 8)

(d) By computing the value of the New Company's earnings until perpetuity and excluding the earnings from 1948 through 1974, since these earnings would go to restoration of the non-cans. (Ex. 28, p. 8, and J. S. 584, Charts I and II)

(e) By estimating how much of the earnings from 1974 to perpetuity would be available as dividends to stockholders. (Ex. 28 and J. S. 584, Chart II)

(f) By determining the 1974 value of those earnings available to stockholders to be $27,700,000, and hence the 1974 value of the New Company. (J. S. 584, Charts I and II)

(g) By discounting the 1974 value of the New Company back to 1948 at a ten percent (10%) compound rate, thereby arriving at the $3,000,000 1948 value. (Ex. 28, p. 2, 8, 12)

We make no challenge to the competence of the Price Determination Committee. Nor, for purposes of this petition, do we challenge the methods, techniques, or computations of the Price Determination Committee, with one single, but very important exception.

The 1974 value for the New Company found by the Price Determination Committee is $27,700,000. With this figure we have no present dispute. But this 1974 value was then "discounted" to establish a 1948 price. And this operation works the confiscation which goes to the very heart of this case.

A discount makes sense and has validity only when taken as consideration for the present payment for a future value. The fundamental vice inherent in the approach of the Price Determination Committee is that, though it discounts a future value presumably for a present payment, it does not actually provide for any present payment, but only for a payment some time in the future. There is, therefore, no validity to the so-called discounting of the 1974 value to 1948 because nothing was to be paid in 1948.

That the 1948 price of $3,000,000 so derived will be augmented by interest to the date paid does not cure this deficiency. The 1974 value was discounted at a compound interest rate of ten percent (10%) to procure the 1948 price, but the interest which the plan provides is to be added to the 1948 price is only at an approximate two and one-half percent (2½%) simple rate. (App. G 6) There is a substantial discrepancy between the ten percent (10%) compound rate back to 1948 and the two and one-half percent (2½%) simple interest rate forward from 1948. Consequently, the augmentation of the purchase price by interest does not make an otherwise invalid "discount" valid, for the interest rate employed to augment the 1948 price is not the same interest rate used to procure the 1948 price.[7]

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[7] We do not contend that any particular interest rate is or is not valid or appropriate in this case. We do contend, and most forcefully, that the interest rate used to augment the 1948 price to the date paid be at least comparable to the interest rate used to discount future earnings to derive the 1948 price. For, it must be remembered, that nothing was ever really "taken" in 1948, and nothing was ever paid for, or could be paid for, in 1948.

A single example suffices to make graphic the confiscatory nature of the arrangement in this case: Assume that the mutualization plan will become effective in 1974. By the Price Determination Committee's own calculations, the 1974 value of the New Company will be $27,700,000. But, by using the 1948 purchase price ($3,000,000) and adding to it simple interest at two and one-half percent (2½%), petitioners will receive in 1974 only $4,875,000, approximately $22,825,000 less than the value which the Price Determination Committee itself determined as the 1974 value. If there was ever a more glaring instance of property taken without just compensation within the meaning of the Fourteenth Amendment, we—like Justice Carter below (App. A 64)—have not heard of it.

The fact of the matter is that anybody would buy the stock of any company, anywhere, at any time, on the basis of the formula established by the Price Determination Committee; and nobody, anywhere, at any time, would sell on the basis of the formula established by the Price Determination Committee.

In conclusion, petitioners desire to make it clear to the Court that we are not complaining about the competence of the Price Determination Committee or the value established by the Committee for the New Company's stock in 1974. But we do complain strenuously that we are not getting that value.

Even assuming that the Insurance Commissioner and the courts below were correct in finding that the Price Determination Committee's conclusions as to value were appropriately supported by the evidence, and assuming further that they were not required to make an independent re-appraisal of these conclusions (See Part 2, *infra*), it does not follow that the

$3,000,000 purchase price fixed by the Committee should also have been sustained, since this price *on the face of the record* is not consistent with the value which the Committee had ascertained. There is no support in the decisions of this Court for a procedure where, in the taking of property, the *price* to be paid is many times less than the *value* which the property is determined to have.[8] The Fourteenth Amendment requires that when one man's property is taken and given to another, the requirements of the due process clause must be met, cf. Frankfurter, J., dissenting, in *International Harvester Credit Corp.* v. *Goodrich, supra,* and due process does not permit the substitution of a strangely derived price for a carefully derived value. The decisions below, in sustaining this departure from the accepted and usual course of judicial procedure, clearly call for an exercise of this Court's supervisory jurisdiction.

C. The confiscation resulting from this utilization of substantially different interest rates is made even worse by other features of the plan. For reasons developed at length in our Jurisdictional Statements, the interest established on the $3,000,000 purchase price is itself confiscatory (J. S. 584, pp. 29-30), and the pro-

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[8] ". . . just compensation . . . means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken . . . courts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the 'value,' the 'market value,' and the 'fair market value' of what is taken. The term 'fair' hardly adds anything to the phrase 'market value,' which denotes what 'it fairly may be believed that a purchaser in fair market conditions would have given,' or, more concisely, 'market value fairly determined.'" *United States* v. *Miller,* 317 U. S. 369, 373-374.

visions for augmentation of the purchase price in the event of the early restoration of non-cans results in extraordinary windfalls to the New Company (J. S. 584, pp. 30-33). We do not further discuss these matters in this petition, but will expand them in the event review is granted.

There is one other feature of the mutualization plan which, we believe, does require comment in this petition. This relates to the operation of the conditions precedent which are required to take place before mutualization can occur. For various reasons set out in detail in the Jurisdictional Statements, (J. S. 584, pp. 27-28; J. S. 585, pp. 5, 12) as a practical matter, before mutualization can occur, the stockholders' equity in the New Company must reach a value substantially in excess of the $3,000,000 purchase price, plus interest, established in the mutualization plan. So—and this is so extraordinary that it prompts disbelief—the Price Determination Committee has, in fact, proffered this proposition to the Old Company and its stockholders: 'Any time within the next 35 years if the New Company (which you own) achieves a value far in excess of $3,000,000 you will receive $3,000,000 for it, but if it does not achieve this value in 35 years, then our deal is off; in the meantime, we will arrange that during those 35 years the New Company will be run for you, but not necessarily in your best interests; and during this 35 year period you cannot buy your company back at any price.'

We believe that the mere statement of this proposition is sufficient and that no argument is necessary.

* * * * * *

The unique and novel features in the mutualization plan can be employed in any instance in which there is need to develop a present price for a going concern, based upon its future earnings. It may thus be used not only in other insurance mutualizations, but in corporate reorganization proceedings as well. Can stockholders in reorganization cases, for example, be forced to accept a conditional obligation for the capitalized present value of their stock when such obligation bears two and one-half percent (2½%) simple interest, and at the same time the present value of future profits have been determined by discounting the future profits on a ten percent (10%) compound interest basis?[9]

If this plan, which has been held to be "fair and equitable" (App. D 22) is permitted to stand without review by this Court, its techniques can be used in other arrangements where the test is also "fair and equitable"; *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510 (Bankruptcy); *Ecker* v. *Western Pac. R. Corp.*, 318 U.S. 448 (Railroad Reorganization); *Otis & Co.* v. *SEC*, 323 U.S. 624 (Public Utility Holding Company Act); *Bailey* v. *Minsch*, 168 F. 2d 635 (1 Cir., 1948) (Receivership) cert. den., 335 U.S. 854; and, indeed, in any instance in which a taking of property requires a determination of present value based on future profits. *Cf. Monongahela Nav. Co.* v. *U. S.*, 148 U.S. 312, 336-337 (toll franchise).

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[9] And this, when the obligation to pay stockholders is dependent upon the same contingency as the emergency of future profits?

2. The Question of Judicial Review

In addition to the questions relating to confiscation, this case also poses another substantial constitutional question of widespread importance as to the scope and extent of judicial review in a valuation case where confiscation is claimed.

There is no dispute that the fairness and equity of the mutualization plan was at no time subjected to independent examination by any judicial tribunal in this case. The form of review afforded by the courts below was at best the substantial evidence test. Yet, the decisions of this Court have held that where a property owner claims that his property is being confiscated by forced disposal for less than it is worth, he is entitled to a genuine and full judicial review, the only restriction being that no new evidence may be introduced before the reviewing court. *Alabama Public Service Commission* v. *Southern R. Co.*, 341 U.S. 341, 348-50; *American Trucking Assos.* v. *United States*, 344 U.S. 298, 320-322; *Baltimore & Ohio R. Co.* v. *United States*, 345 U.S. 146.

So far as counsel can determine, this Court has sanctioned the use of the substantial evidence type of review in corporate reorganization involving property valuations in only two special situations, namely, ICC railroad reorganizations and SEC public utility holding company simplifications. *Ecker* v. *Western Pac. R. Corp.*, 318 U.S. 448; *RFC* v. *Denver and Rio Grande Western R. Co.*, 328 U.S. 495, *SEC* v. *Central-Illinois Corp.*, 338 U.S. 96, *Niagara Hudson Corp.* v *Leventritt*, 340 U.S. 336. It is hardly necessary to point out that the present case involves no issues of public urgency, no "brigading" of court and highly expert

administrative agency, and no circumstances of any kind comparable to those which persuaded this Court to permit the ICC and SEC exceptions. Cf. *Ecker* v. *Western Pac. R. Corp., supra,* at p. 468.

The importance of guidance from this Court on this difficult and critical question of judicial review has frequently been noted. See Brief of Solicitor General in *Ecker* v. *Western Pac. R. Corp., supra,* reported at 87 L. Ed. 918, 920; similar comments of Justice Rutledge in *SEC* v. *Central-Illinois Corp., supra,* at 113 *et seq.* See also Justice Frankfurter's special opinion in connection with denial of certiorari in *Bondholders Inc.* v. *Powell,* 342 U.S. 921; and Justice Reed's special opinion on application for stay in re *Equitable Office Building Corporation, Debtor,* 96 L. Ed. 1386 (not officially reported). And as recently as March 26, 1956, this Court reaffirmed its traditional concern in monitoring the form of proceeding required in the overhauling of financially distressed businesses. *General Stores Corp.* v. *Shlensky,* — U.S. —, 24 Law Week 4141.

The basic problem in this case stems from *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U.S. 287, where this Court held that the Fourteenth Amendment required that, in all cases where a state administrative order is attacked as confiscatory, "the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts", 253 U.S. at 289. The doctrine promulgated in this case was expressly followed in two later cases—*United Railways & Electric Co. of Baltimore* v. *West,* 280 U.S. 234, and *State Corp. Comm.* v. *Wichita Gas Co.,* 290 U.S. 561. Thereafter, the *Ben Avon* doctrine was

clarified and somewhat narrowed in *St. Joseph Stockyards Co.* v. *United States,* 298 U.S. 38. See particularly 298 U.S. at 49-54.

Since the *St. Joseph* decision, the *Ben Avon* doctrine has not been expressly applied by this Court. Indeed, some commentators have speculated that it no longer has vitality. See *Note* 57 *Yale L. J.* (1948) 639 and authorities cited in fn. 1; *Cf. Jaffe, Administrative Law* (1953) p. 617. Undoubtedly, the doctrine has been limited in its effectiveness by the increasingly narrow application of substantive due process in the economic field. *Cf. FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591. And although this Court has not expressly applied the *Ben Avon* doctrine since 1937, there has been some recognition of its continuing validity in a recent case. Frankfurter, J., concurring in *Alabama Public Service Commissioner* v. *Southern R. Co.,* 341 U.S. 341, 362.

The majority of the Court below held that independent judicial examination was not required (App. A 14) and Justice Carter, dissenting, stated that in his view this denial worked a deprivation of due process under the federal constitution, citing, *inter alia,* the *Ben Avon* and *St. Joseph Stockyard* cases. (App. A 56-64) Moreover, the importance of this principle in this case is more than abstract, since the trial judge expressly stated that if he had been able to make an independent examination and judgment he "could not take the facts and arrive at the same conclusion; not by a long shot." (App. A 65)

Thus, this case provides a direct and meaningful opportunity to re-examine the *Ben Avon* doctrine in the light of modern trends and the increase in administrative regulation, and to set at rest—as only this Court

can—the questions of whether the doctrine continues to apply today and, if so, the precise scope and extent of its application.

3. Res Judicata

Much has been written in the decision below and in the papers filed in this Court by respondents-appellees regarding the application of the doctrine of res judicata. In fact, the gist of respondents-appellees' arguments have been that all [redacted] contentions are foreclosed by res judicata (see Appellants' Memorandum, No. 584, p. 2).

We do not desire, in this petition, to re-argue at any length this issue of res judicata. For present purposes, it is sufficient to state that the questions presented under points 1 and 2, *supra,* are plainly outside the scope of any and all claims of res judicata made by respondents-appellees.

The doctrine of res judicata necessarily presupposes a prior occasion in which issues were or could have been litigated between the same parties. Neither the claim of confiscation directed at the substance of the mutualization plan, nor the denial of appropriate judicial review in the state courts of California were or could have been litigated until the instant proceeding was instituted. Consequently, res judicata is plainly inapplicable to them. This litigation, after all, was instituted solely to challenge and procure a review of the substance of the mutualization plan itself. No prior litigation could be res judicata with regard to the validity of the mutualization plan because there was no mutualization plan heretofore. Similarly, the question of judicial review in the California courts could not have been raised heretofore, because *this* is

the case in which that judicial review based on confiscation was first demanded.

And, there is still another important reason why any claim of res judicata cannot be properly made against the points asserted in this petition. This is because Paragraph 20(a) of the Rehabilitation Agreement—which is the seed from which respondents-appellees' claims of res judicata stem—expressly provides that the mutualization plan, when formulated, must be submitted "in accordance with the laws of the State of California in effect at the time." (App. F 24) To put it in its simplest terms, it would have been impossible at the time the Rehabilitation Agreement was approved in 1936 to know, and therefore to litigate, what laws of the State of California relating to mutualization would be in effect in 1950.

CONCLUSION

For the reasons set forth above, and in the papers heretofore filed in these cases, it is respectfully submitted that a rehearing should be granted.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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